Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1034

In the Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
APPELLANT,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,
APPELLEES.

On Appeal from the United States Court of Appeals for the Fourth Circuit

APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

MARY SUE TERRY
Attorney General of Virginia

*RICHARD B. SMITH
Assistant Attorney General

MARK R. DAVIS
Assistant Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6563
Counsel for Appellant

**Counsel of Record*

Appellate Printing Services • Heritage Bldg. • 10th & Main • Richmond, VA 23219 • (804) 643-7789

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1034

COMMONWEALTH OF VIRGINIA,
APPELLANT,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,
APPELLEES.

On Appeal from the United States Court of Appeals for the Fourth Circuit

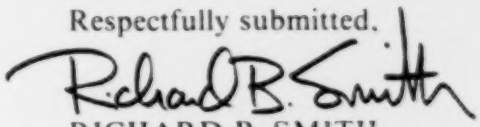
---

APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Pursuant to Rule 35.6 of the Rules of this Court, the Commonwealth of Virginia, the Appellant herein, seeks leave to file the attached supplemental memorandum addressing the propriety of certifying questions concerning the scope of Virginia's "manner of display" statutes (Va. Code §§ 18.2-390 and 391) to the Supreme Court of Virginia pursuant to that court's Rule 5:42. The issue of certification was not discussed in the briefs of the parties, but was raised by the Court at oral argument. The Appellees have filed a supplemental memorandum arguing that the certification procedure should not be used by the Court. Virginia believes that the considerations stated in her short supplemental memorandum would be relevant to the Court's decision.

It is therefore respectfully submitted that this motion for leave to file the attached supplemental memorandum should be granted.

Respectfully submitted,



RICHARD B. SMITH
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6563
Counsel for Appellant

November 1987

TABLE OF AUTHORITIES

CASES

Page

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 2

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 3

Commonwealth v. Ellett, 174 Va. 403, 4 S.E.2d 762 (1939) 2

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 2

New York v. Ferber, 458 U.S. 747 (1982) 3

Screws v. United States, 325 U.S. 91 (1943) 3

STATUTES AND RULES

Rule 5:42 of the Rules of the Supreme Court of Virginia 1, 2, 3

Sections 18.2-390 and 391 of the Code of Virginia 1

Virginia Rule 5:42. Certification Procedures.

(a) *Power to Answer.* — The Supreme Court [of Virginia] in its discretion may answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia.

(b) *Method of Invoking.* — This Rule may be invoked only by an order of one of the courts referred to in section (a). No party litigant in the foregoing courts may file in the Supreme Court a petition or motion for certification.

(c) *Contents of Certification Order.* — A certification order shall set forth:

(1) the nature of the controversy in which the question arises;

(2) the question of law to be answered;

(3) a statement of all facts relevant to the question certified;

(4) the names of each of the parties involved;

(5) the names, addresses, and telephone numbers of counsel for each of the parties involved;

(6) a brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court; and

(7) a brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals of Virginia and the reasons why such decisions are not controlling.

(d) *Preparation of Certification Order.* — The certification order shall be prepared by the certifying court, signed by the presiding justice or judge, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the certified question. The Supreme Court may in its discretion restate any question of law certified or may request from the

certifying court additional clarification with respect to any question certified or with respect to any facts.

(e) *Notification of Acceptance or Rejection.* — The Supreme Court, in its discretion, may decide whether to answer any certified question of law. The Supreme Court will notify the certifying court and counsel for the parties of its decision to accept or reject any certified question of law. A notice accepting a question will include a briefing schedule and, if oral argument is permitted by the Supreme Court, a tentative date and the length of time allowed for such argument.

(f) *Revocation of Acceptance.* — The Supreme Court, in its discretion, may revoke its decision to answer a certified question of law at any time. Upon deciding to revoke, the Supreme Court will notify the certifying court and counsel for the parties of its action.

(g) *Costs of Certification.* — Fees and costs shall be the same as in civil appeals docketed in the Supreme Court and shall be paid as ordered by the certifying court in its order of certification.

(h) *Briefs.* — The form, length, and time for submission of briefs shall comply with Rules 5:26 through 5:34 *mutatis mutandis.*

(i) *Opinion.* — A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports.

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1034

COMMONWEALTH OF VIRGINIA,
APPELLANT,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,
APPELLEES.

On Appeal from the United States Court of Appeals for the Fourth Circuit

---

APPELLANT'S SUPPLEMENTAL MEMORANDUM

The Court inquired *sua sponte* during oral argument as to the feasibility of certifying questions to the Supreme Court of Virginia concerning the meaning of certain provisions of Virginia Code §§ 18.2-390 and 391. Although the Appellees did not object when the question arose, they now strenuously, and rather desperately it seems, do so.

The Appellees first complain that Virginia did not ask either the district court or the court of appeals to certify questions to the Virginia Supreme Court. They well know, however, that no such procedure was available in Virginia when this case was pending in the courts below, the applicable Rule 5:42 of the Supreme Court of Virginia not having become effective until April 1, 1987. And, although the Appellees seem to hint that the State is somehow guilty of "sandbagging" in this matter, they do not suggest how we

were supposed to ask the courts below to use a certification procedure that did not yet exist.[1]

The Appellees further contend that "this [case] may not be the sort of situation to which the Virginia certification procedure was meant to apply" because the Virginia Supreme Court's answers to any certified questions supposedly would not ultimately determine the outcome of the case. The courts below, however, based their invalidation of Virginia's "manner of display" amendment on the alleged breadth of its terms, giving them the broadest possible interpretation. A narrow construction of the provision's meaning by the Virginia Supreme Court would thus vitiate the basis of the lower courts' judgments and *a fortiori* determine this case in Virginia's favor.

Virginia therefore believes that it would not be inappropriate for this Court to certify questions concerning the Amendment's provisions to the Supreme Court of Virginia and for that court to answer them under its Rule 5:42, and the Appellees cite no *Virginia* authority to the contrary. We also believe, however, that, while certification would not be inappropriate, the Court need not resort to it in order to resolve this litigation.

This case involves a *facial* attack on a Virginia statute. For more than two years Virginia has consistently asserted narrowing constructions of the Amendment's terms that are not just plausible, but which are required by Virginia law. *See Commonwealth v. Ellett*, 174 Va. 403, 4 S.E.2d 762 (1939) (Virginia law requires that criminal laws be strictly construed *against the State*). Given the availability of these profferred narrowing constructions, this Court's jurisprudence makes clear that Virginia's "manner of display" amendment must survive the Appellee's *facial* attack: "Facial overbreadth has not been invoked when a limiting construction. . . *could* be placed on the challenged staute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (emphasis added); *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (a state statute should not be deemed

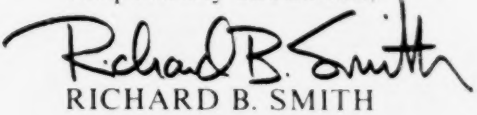
---

[1] The Appellee's also state that Virginia did not raise an abstention argument in this Court, but they contended in their own brief that we did in fact do so and responded to our argument at length. (Appellee's Br. 22-25).

facially invalid unless it is not subject to narrowing construction by state courts); *New York v. Ferber*, 458 U.S. 747, 773 (1982) (this Court will not assume that state courts will widen the possibly invalid reach of a statute by giving it expansive constructions.)[2]

In conclusion, if this Court deems it necessary to certify questions to the Virginia Supreme Court as to the meaning of Virginia's 1985 "manner of display" amendment, Virginia believes and will argue that the Supreme Court of Virginia should answer such questions under its Rule 5:42. Virginia also believes, however, that, because this case involves a *facial* attack, this Court has before it sufficient narrowing constructions to validate the Amendment now, without resorting to the certification procedure.

Respectfully submitted,



RICHARD B. SMITH
Assistant Attorney General
Counsel of Record

MARK R. DAVIS
Assistant Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6563
Counsel for Appellant

November 1987

---

[2] The courts below ignored the rule that federal courts must accord a state law an interpretation supporting its constitutionality, *Screws v. United States*, 325 U.S. 91, 98 (1943) (plurality opinion), and simply *assumed* the broadest possible meanings of the Amendment's terms without ever analyzing them under Virginia law; in fact, the court of appeals relied on a wholly different and much broader *Georgia* statute to determine the supposed scope of the *Virginia* provision under attack. (J.S. App. A-9). This Court will not defer to lower federal courts on state-law issues under such circumstances. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 91, 500 n.9 (1985).